

THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE No. 661

RAIL FUEL SURCHARGES

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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October 2, 2006

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The Association of American Railroads (“AAR”) hereby submits comments in connection with the Surface Transportation Board’s (“STB” or “Board”) decision served August 3, 2006, in the *above captioned proceeding*. Since 1934, the AAR, a non-profit trade association, has represented the interest of major freight railroads in North America. As such, the AAR has a keen interest in the subject of this decision. In fact, several of its members presented testimony in connection with the May 11, 2006 hearing held by the STB on fuel surcharges.

I. Overview

The AAR appreciates the opportunity to present comments on the important issue of fuel surcharges. We understand the STB’s interest in this matter, and our industry remains committed to working with its customers on this issue. These comments are filed on behalf of the AAR members to reflect general views on the Board’s process and certain legal issues relating to its proposals. AAR members may be separately filing comments expressing their particular views on the substance and any implementation of the Board’s proposals.

II. A Fuel Surcharge Is A Rate, Not A Practice.

The STB argues that a fuel surcharge should be considered a practice, not a rate, for the purposes of its August 3 decision. It concludes in its decision that, because it is not ruling on the level of the surcharge but rather on the method by which the surcharge is determined, it has the authority to evaluate fuel surcharges as a practice. The AAR respectfully disagrees with this position. The method by which the surcharge is calculated should not dictate whether it is to be evaluated as a rate or a practice.

The case law clearly supports the AAR's position. In *Charges For "Order Of" Bills of Lading, Burlington Northern R.R.*, ICC Docket No. 40679 (ICC served Nov. 27, 1992) at 1, for example, the ICC considered the carrier's imposition of a separate \$125 charge on its customers for the use of "order bills of lading or straight bills of lading with restricted delivery instructions" to fall under its rate jurisdiction as opposed to its practice jurisdiction. This suggests that any carrier behavior involving the assessment of separate fees should be considered as falling "squarely on the side of 'rates,'" not practices. See *Union Pac. R.R. v. ICC*, 867 F.2d 646, 649 (D.C. Cir. 1989). The *Union Pacific* court took this analysis even further. While it expressly recognized the possibility of overlap between practices and rates, the touchstone of the inquiry, it explained, is whether "the so-called 'practice' is manifested *exclusively* in the level of rates that customers are charged." *Id.*; see also *United States Dep't of Energy v. Baltimore & Ohio R.R.*, ICC Docket No. 37076 (ICC Served Feb. 7, 1992) at 7 n.11. Here, the fuel surcharge is similarly manifested exclusively in the level of rates that rail customers are charged; thus, it properly falls within the rubric of the Board's unreasonable rate jurisdiction. Indeed, "surcharges must be viewed as unilateral changes in . . . rates." *Conrail Surcharge on Pulpboard*, 362 I.C.C. 740, 744 *modified*, 362 ICC 842 (1980).

It has also been suggested that the agency should regulate as a practice surcharges that are incorporated by a carrier into the base rate, based on the argument that this is really an action to circumvent the STB's intention to regulate surcharges as a practice. The AAR respectfully suggests that such an action by the agency would be ill-founded. Under the case law, a surcharge is a rate, not a practice, no matter how it is charged.

Thus, whether the surcharge is based on the percentage of the base rate or some other method of calculation, it is a fee that is reflected in the rate charged the customer. Under existing precedent, it should be considered a rate, not a practice, and reviewed under the rate reasonableness provisions of the statute.

III. There Is No Record That Fuel Surcharges Are Unreasonable Practices In Any Event.

Even if fuel surcharges were to be legitimately considered a practice, the AAR respectfully suggests that the STB has not developed a record from which it could conclude that there is an unreasonable practice here. Thus, the agency has no basis upon which to take action.

The case law supports the AAR's position in this regard as well. While "[u]nreasonable practices are not specifically defined in [49 U.S.C. § 10701], . . . this concept does not provide a clean slate on which to write a code of conduct for the carriers. Rather, [the Board] must review the carriers' actions according to the congressional directions embodied in the various relevant provisions" of the statutes governing interstate transportation by rail. *Shippers Comm., OT-5 v. Ann Arbor R.R.*, 5 I.C.C.2d 856, 863 (1989). A practice should be declared unreasonable if the carrier's behavior is found to violate a particular statutory provision. *See Liability for Contaminated Covered Hopper Cars (Ill. Cent. R.R.)*, 10 I.C.C.2d 154, 168-69 (1994) (finding challenged practices unreasonable because they violated then 49 §§ 11707 & 11121). Here, however, while the agency raises concern in its August 3 decision that fuel surcharges calculated

as a percentage of the base rate are not sufficiently cost-based, it has not made a specific finding, based on a formal complaint, that any applicable statutory provisions have been contravened, nor could it make such a finding based on the law.

Fuel surcharges should be considered a rate, not a practice. Even if they are considered a practice, there is no record in this proceeding that they are an unreasonable practice.

IV. The AAR Is Concerned That A Sufficient Record Has Not Been Developed Regarding The Feasibility Of An Industrywide Mileage Or Mileage And Weight Based Approach.

In exercising what it concludes to be its unreasonable practice jurisdiction here, the STB propounds the industrywide adoption of a mileage or mileage and weight based approach to fuel surcharges. The AAR is concerned that the agency has not compiled a record from which it could conclude that at this time such an approach would be uniformly workable throughout the industry. At a minimum, the AAR urges the agency to allow for a phase-in period for any approach pursued to ensure that any industrywide implementation issues could be more fully understood and addressed.

One Class I rail carrier, BNSF, has adopted a mileage-based approach for single line movements. While BNSF has implemented such an approach, the record developed by the STB to date does not provide a sufficient basis for concluding that other carriers are in a position to take the same action. And, with the interline traffic for individual railroads at roughly 35 percent of their total traffic volumes, it is not clear from the record that such an approach could be implemented on an industrywide basis at this time.

The May 11, 2006 hearing developed a record on the specifics of existing carrier surcharge programs and customer concerns with those programs. However, no record was

developed in the hearing concerning industrywide implementation of the approach now being propounded by the agency.

V. Any New Approach Must Be Prospective And Only Applicable To Tariffs For Regulated Traffic.

While the AAR does not believe that a sufficient record has been developed in connection with the specifics of an industrywide mileage or mileage and weight based approach, we seek clarity as to the applicability of the propounded approach. In particular, any such approach must be prospective and only applicable to tariffs for regulated traffic.

Anything mandated here by the agency cannot apply to contracts, whether for regulated or exempt traffic. The Board has “no jurisdiction over rail transportation contracts” entered into under 49 U.S.C. § 10709. *Kansas City Power & Light Co. v. Union Pac. R.R.*, STB Docket No. 42095 (STB served July 27, 2006) at 1. Section 10709(c)(1) specifically states: “a contract . . . may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.” In the Staggers Rail Act of 1980, “Congress expressly removed all matters and disputes arising from contracts from the ICC’s (and now the Board’s) jurisdiction.” *Kansas City Power & Light Co.* at 2. Indeed, “[a]s for transportation that is provided under a rail transportation contract,” the Board “cannot enforce, interpret, or disturb the contracts.” *Expedited Relief for Service Inadequacies*, STB Ex Parte No. 628 (STB served Dec. 21, 1998) at 10. Also, the Board’s jurisdiction over purportedly unreasonable practices extends only to “rail carrier[s] providing transportation or service subject to the jurisdiction of the Board.” 49 U.S.C. § 10702. Such jurisdiction would not extend to rail transportation contracts.

In addition, the agency cannot, and should not, apply any new approach retroactively. In a recent decision discussing the retroactivity of an administrative decision, the United States

Court of Appeals for the District of Columbia Circuit reiterated the distinction between an administrative decision that substitutes new law for old law, and for which retroactivity would not be appropriate, and a decision that is “merely [a] ‘new application[] of existing law, clarifications, and additions,’” in which case retroactivity would be appropriate. *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006) (quoting *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001)). In situations where new law is substituted for old, the rule of prospective-only effect is premised on the need “to protect the settled expectations of those who had relied on the preexisting rule.” *Verizon*, 269 F.3d at 1109. *See also Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60 n.12 (1984) (explaining that avoiding disruption of “reasonable reliance interests” militates against the retroactive application of new agency rules). Even where a decision is simply a new application of existing law and retroactivity is generally appropriate, retroactive application is not appropriate if it would lead to “manifest injustice.” *AT&T*, 454 F.3d at 332 (quoting *Verizon* and citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987). *See also Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (“[T]he test’s factors ““boil down . . . to a question of concerns grounded in notions of equity and fairness.”” (quoting *Clark-Cowlitz*, 826 F.2d at 1082 n.6)).

Here the STB is proposing a new industrywide approach, which has not been the industrywide rule. Thus, its retroactive application would not seem appropriate. Even if this new approach were somehow not considered to be a new rule, its retroactive application nevertheless would not be consistent with legal notions of fairness.

As a general matter, retroactive application is not favored under the law. In *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), the Supreme Court considered the Secretary of Health and Human Services’ authority to engage in retroactive rulemaking in connection with

Medicare cost-reimbursement regulations. Interpreting the statutory provisions establishing the Secretary's rulemaking authority, the Court held that Congress did not give the Secretary retroactive rulemaking authority. *Id.* at 213-14. The decision has a lengthy discussion about how retroactivity is not favored.

In particular, the Supreme Court explained:

"Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. *E.g., Greene v. United States*, 376 U.S. 149, 160, 84 S.Ct. 615, 621-622, 11 L.Ed.2d 576 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164, 65 S.Ct. 172, 185, 89 L.Ed. 139 (1944); *Miller v. United States*, 294 U.S. 435, 439, 55 S.Ct. 440, 441-442, 79 L.Ed. 977 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-163, 48 S.Ct. 236, 237, 72 L.Ed. 509 (1928). By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *See Brimstone R. Co. v. United States*, 276 U.S. 104, 122, 48 S.Ct. 282, 287, 72 L.Ed. 487 (1928) ('The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words'). Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant."

Bowen v. Georgetown Univ. Hosp., 488 U.S. at 208-09.

Thus, no matter how the Board seeks to exercise authority over fuel surcharges, it cannot do so with respect to rail transportation contracts. Also, it cannot legally apply any approach retroactively, nor would it be good policy to do so particularly given the uncertainty and complexity that such an action would create for commercial arrangements between carriers and customers.

VI. The Mandate Of A Single Approach Must Be Based On Full Notice And Comment.

As the AAR has already indicated, we believe that the STB does not have the legal authority to mandate an industrywide approach to fuel surcharges, nor has it developed an adequate record as to its implementation. The mandate of a single approach requires full notice

and comment as called for under the Administrative Procedures Act (“APA”). As part of this process, the costs of any such mandate must be evaluated. Neither, the AAR respectfully submits, has been done here.

The APA provides that a rule which “impose[s] new rights or obligations...must follow the applicable procedures of the APA.” *Gunderson v. Hood*, 268 F.3d 1149, 1154 (9th Cir. 2001). The approach proposed by the Board would most certainly impose new “obligations” on rail carriers. Moreover, rules promulgated by administrative agencies must be subject to full notice and comment procedures unless they are “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. § 553(b)(A). The Board has not stated that the approach propounded here falls into any of these excepted categories, and none of the other exceptions to the APA requirements of full notice and comment apply here. *See* 5 U.S.C. § 553(a), (b)(B).

Furthermore, a rule is deemed “arbitrary and capricious,” and therefore violates the APA, if the promulgating agency fails to consider factors it “must consider under its organic statute.” *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004). Here, the STB has not justified its alternative industrywide approach to surcharges from a cost/benefit perspective. The rail transportation policy objectives are set forth in 49 U.S.C. § 10101; one of the objectives is efficiency. In *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005), the court held that the Securities and Exchange Commission (“SEC”) had violated the APA when it failed to consider the costs that its proposed rule would impose on the regulated entities in question because efficiency was one of the SEC’s statutory objectives. The STB has not specifically considered cost efficiency, or any of the other statutory objectives, in propounding its approach.

Pursuant to the APA, any mandate must be reviewed in accordance with the full notice and comment procedures and the statutory directives of its organic statute. The imposition of a new regulatory obligation with respect to fuel surcharges demands no less.

VII. The STB Has Not Developed A Record In This Proceeding Sufficient To Revoke The Exemption For Intermodal And Other Traffic.

In the context of its August 3 decision, the STB indicates its intention to partially revoke the exemption applicable to traffic otherwise exempted in order to exercise regulatory oversight with respect to fuel surcharges affecting that traffic. This action, in the AAR's view, is without foundation.

Revocation of an exemption must be based on a specific record, which has not been developed in this case. Under 49 U.S.C. § 10502(d), the Board "may revoke an exemption . . . when it finds that application in whole or in part of a provision of [Title 49] to the person, class, or transportation is necessary to carry out the [rail] transportation policy of section 10101." The Board also may revoke a class exemption, in whole or in part, if it finds that the notice of exemption (or request for exemption) contained false or misleading information or if revocation is necessary to ensure the integrity of the Board's processes. *See SF&L Ry.-Acquisition and Operation Exemption-Toledo, Peoria & W. Ry. Between La Harpe & Peoria, IL*, STB Finance Docket No. 33995 (STB served Oct. 17, 2002) at 10.

Questions concerning exemption revocations have arisen in the context of a petitioner's filing of a "request for revocation" with the Board. *See* 49 U.S.C. § 10502(d) (explaining that a decision about whether to institute a revocation proceeding will be made within 90 days of "receipt of [the] request for revocation," and that "[a]ny proceeding begun as a result of [such] a request" will be completed within nine months). In these circumstances, the party advocating

revocation of the exemption has the burden of proof to establish that regulation (and thus revocation) is necessary to fulfill the goals of rail transportation policy. *See City of Ottumwa v. STB*, 153 F.3d 879, 884 (8th Cir. 1998); 49 C.F.R. § 1121.4(f). Revocations must be premised on reasonable and specific concerns that reconsideration of the exemption is warranted, supported by evidence in the record. *See New York, Susquehanna & W. Ry.-Trackage Rights Exemption-Onondaga County Indus. Dev. Agency & Consolidated Rail Corp.*, STB Finance Docket No. 32772 (STB served Aug. 7, 2001) at 4; *CSX Transp., Inc.-Abandonment Exemption-In Randolph County, WV*, 9 I.C.C.2d 447, 449 (1992).

With respect to fuel surcharges, the Board cites elements of the rail transportation policy as general justification for partial revocation. However, it does not give any specific reasons based on evidence of record as to whether partial revocation would be appropriate. The STB cannot cite any such record, the AAR respectfully submits, because it has not been developed. There could be no record upon which to partially revoke the exemption for intermodal traffic, for example, because at the hearing there was almost no discussion of intermodal traffic and fuel surcharges in connection with that traffic. Revocation of an exemption must be based on a specific factual record, which has not been developed in this case.

VIII. Conclusion

AAR members are interested in a fair resolution of the issues in this proceeding. Each looks forward to working with its customers in this regard, and may address the substance of the Board's proposals and any implementation in separately filed comments. In any event, the AAR reiterates its position that the STB's actions with respect to fuel surcharges must be consistent with the law and based on a record that has been developed, neither of which the AAR respectfully suggests is present here.

Fuel surcharges are not practices, as the STB would suggest. In any event, there is no record to suggest that there has been an unreasonable practice here. Furthermore, no record has been developed in connection with the implementation of an industrywide mileage or mileage and weight based approach, nor to justify a partial revocation of the exemption covering intermodal and other traffic. And, if an industrywide approach is to be mandated, it should not be applied retroactively, and full notice and comment under the APA, as well as clarity as to the application of such an approach, must be provided.

Respectfully submitted,



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